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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 590

CLYDE E. CLAPPER, *Petitioner*

v.

THE ORIGINAL TRACTOR CAB COMPANY, INC., and STANLEY WILLIAMS, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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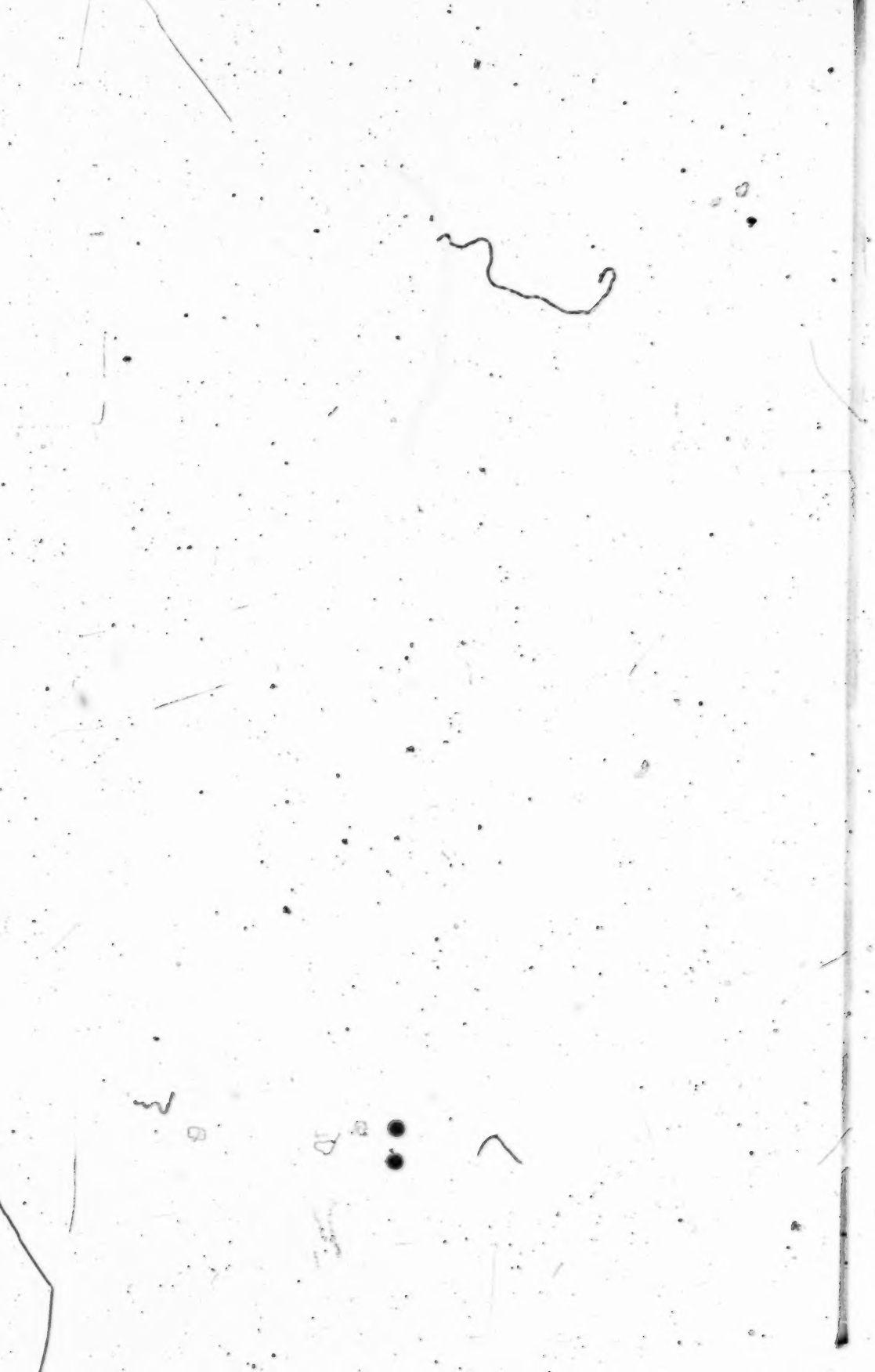

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The Petition for a writ of certiorari is bottomed on an allegation of a conflict between the Second Circuit and the Seventh and Tenth Circuits as to the construction of the anti-trust and patent laws. No affirmative assertion is made of a definite conflict of opinion between those Circuits on the same issue, and none can be made, because the decision in the Second Circuit, to which reference is made, did not involve the same question decided by the Court below in accordance with the decision in the Tenth Circuit.

The Petition, therefore, is opposed by Respondents on the ground that no valid reason is presented for granting the writ; and none of the usual reasons for the writ has been shown to be applicable here.

STATEMENT OF THE CASE

This suit was instituted in April, 1950, for an infringement of an invalid patent, in furtherance of a conspiracy to violate the anti-trust laws of the United States.

The License Agreement (PA491)* of August 3-4, 1948, has been adjudicated to be illegal and the petitioner has been enjoined from enforcing its provisions (Ex. C, A107).

When the petitioner and his co-conspirators attempted to force the respondents out of business, they sought to exert from them an agreement to discontinue; but at the meeting held in Chicago on September 12, 1949, with the respondent, Williams, and his attorney, no agreement was reached to that effect (A14-15). The "spokesman" referred to in the findings of the District Court, who acted at that meeting, was the present attorney for the petitioner, who took an active part in the conspiracy.

There is no evidence that the respondents ever recognized the effectiveness of the Clapper patent, or that they paid royalties to Clapper for a license under that patent. The petitioner's statements with respect to these matters are completely false, as they are with respect to many other matters contained in the brief.

* "PA" refers to the Plaintiff's Appendix in the Court of Appeals; "A" refers to the appendix to the Petition for Certiorari.

Neither is there evidence that the respondents instigated the Department of Justice suit (A107), as erroneously and falsely stated in the petition. As noted by the District Court, the reason for allowing the petitioner to procure a consent decree which enabled him to continue the prosecution of this illegal suit for alleged infringement of an invalid patent is entirely unexplained (A46-47):

> "Instead of withdrawing the complaint for patent infringement, the plaintiff and his co-conspirator, Flora, chose to pursue the action beyond the date of that decree, even though they knew it was a remnant of their earlier conspiratorial actions." (A47)

QUESTION 1

Question 1 does not properly state the basis of the decision by the Court of Appeals below.

The attorneys' fees and expenses allowed Respondents for defense of the patent infringement suit were predicated on the findings by the District Court that this patent infringement suit was filed as an act of conspiracy in violation of the anti-trust laws:

> "41. * * * in accordance with an understanding reached by the parties to the agreement of August 3-4, 1948, at that meeting, this action was instituted in April, 1950, claiming infringement of the Clapper * * * patents".
>
> (PA 380)

> "71. The evidence shows that the Defendant, Original, has incurred in fees and expenses obligations for $28,244.31 in defense of the patent infringement action instituted by the Plaintiff and Flora as a part of the conspiracy in violation of the anti-trust laws."
>
> (PA 390)

This was not an ordinary action for patent infringement. It was instituted, and has been maintained, by the petitioner in furtherance of the anti-trust violation and in accordance with the illegal agreement which was the basis of the counterclaim under the Clayton Act. This fact should be borne in mind in considering the award to the Defendant of the cost of defending the patent infringement suit.

This Court has stated many times that a patent infringement action cannot be instituted and maintained on the basis of a patent that is used as a part of a conspiracy in violation of the anti-trust laws. *B. B. Chemical Co.* v. *Ellis*, 314 U.S. 495; *Morton Salt Co.* v. *The G. S. Suppiger Co.*; 314 U.S. 488; *Mercoid Corp.* v. *Minneapolis Honeywell Regulator Co.*, 320 U.S. 680; *U. S. Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457.

The findings of fact of the District Court (PA 365-400), establish that this patent infringement suit was instituted as a part of a conspiracy in violation of the anti-trust laws. There is no finding of fact by the Court below that the Plaintiff has ever purged himself of this violation, although, in the Petition, it is asserted that the petitioner did purge himself of the violation during the course of this litigation. The important point, moreover, is that the suit has continued and has been maintained by the petitioner, so that its filing "in violation of the anti-trust laws" has remained a continuing offense by the petitioner through the pendency of the suit.

If the petitioner did, in fact, purge himself of the violation, he should have dismissed the suit for patent infringement, but he chose not to do so and, on the

contrary, claimed damages for patent infringement not only for the entire pendency of the litigation but, in fact, for six years next preceding the filing of the suit in April, 1950 (PA 56, paragraph XVIII).

Question 1, as propounded by the Petitioner, omits the very important condition with respect to the patent infringement action, that it was filed as a part of the conspiracy in violation of the anti-trust laws. That is the circumstance here involved and it is the basis for the award of damages for this Clayton Act violation, including the cost of defending the patent infringement action.

The Court of Appeals called attention to these circumstances as the basis for its decision on the method of handling the cost of defending the patent infringement action. Note the statement:

> "As Defendants point out, however, as late as 1955, Clapper was still seeking injunction and damages for the preceding 6-year period." (A83)

Again, the Court of Appeals, after referring to the circumstances under which attorneys' fees are allowed to the successful party in a patent infringement action, under Title 35, U.S. Code, § 285, noted that those cases did not do full justice to this situation, on the basis of the findings of fact of the District Court:

> "On the other hand, the District Court's reference to the use of the patent by the patentee and his licensees can have reference only to the anti-trust violations. The record of this eight-year long litigation fully supports such a finding, and defendants are entitled to have their reasonable attorneys' fees and expenses included as an element of damages in the anti-trust action."

It is clear from these statements that the Court of Appeals below treated the question of attorneys' fees for defense of the patent infringement action as an element of compensatory damages and reversed the conclusion of law of the District Court on the basis of that same District Court's findings of fact.

The decision of the Court of Appeals was controlled not by the mere fact that this was an action for patent infringement, but by the findings of fact that the action for patent infringement was instituted and has been maintained by the petitioner as a part of the conspiracy in violation of the anti-trust laws. This circumstance should be included as a part of the question presented to this Court.

QUESTION 2

The Petitioner does not unequivocally assert, either in his question or in argument that the Court of Appeals below has decided this matter contrary to the decision of the Second Circuit in *Straus* v. *Victor Talking Machine Company*, 297 Fed. 791. That is, no doubt, due to the fact that a careful analysis of these cases will show that the real question decided by the Court below was different from that decided in *Straus* v. *Victor*. The real question decided below is as noted above under Question 1, that the action was filed as a part of the conspiracy in violation of the anti-trust laws. This was also the basis of the decision by the Tenth circuit in *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F. (2d) 416. This case in the Tenth Circuit affirmed the decision of the District Court reported in 97 F. Supp. 342, where it will be noted in findings of fact 76 and 77, that the suit for patent infringement had been commenced and maintained as an act of violation of

the anti-trust laws, and that was the basis for the inclusion of the cost of defending the patent infringement action as an element of damages under the anti-trust laws. That was also the basis of the decision of the Court of Appeals below. In this case, the District Court made similar findings, setting forth that the suit was instituted as a part of the conspiracy.

When we turn to *Straus* v. *Victor*, however, we find a very different situation. There were no findings of fact in that case, but the Court does make clear that its decision is predicated on a finding that the suit for patent infringement was not filed as a part of a conspiracy in violation of the anti-trust laws. The Petitioner conveniently omits this statement from his argument and quotation (Petition, page 17). The decision of the Court of Appeals recites the arguments with respect to the filing of the action for patent infringement and then sets forth:

> "But all this is no evidence in the sense of the law that the bringing of a suit to establish rights was 'a step in pursuance of the combination' ".
> (page 797 of 297 Fed.)

It is clear from this statement of the Court of Appeals that its decision with respect to attorneys' fees was predicated on a finding that the action for patent infringement was not filed in furtherance of a conspiracy in violation of the anti-trust laws. Without that significant finding, the Court held that it would be inappropriate to include the cost of defending the action for patent infringement as an element of compensatory damages. This is further confirmed by the concluding paragraph of that opinion on this point:

> "Never was it more necessary than now to preserve unimpaired this right so vital to the public

welfare and so thoroughly a part of our theory of government. New economic problems increasingly arising in a constantly developing nation require solution, and hence lead to legislation. The statutes thus enacted to meet these problems can rarely, if ever, be so certain and detailed in expression that their meaning or extent can be ascertained without judicial determination. The difficulty which attends their construction is best shown by the wide variance in the opinion of the courts and the constant resort to the Supreme Court for authoritative decision. It is thus not strange that lawyers and laymen may differ as to the meaning of such statutes, and it would be a negative of the principle and right of free access to the courts to hold that the submission of rights to judicial determination involved a dangerous gamble which might subject the loser to heavy damage."

(page 799 of 297 Fed.)

As this Court has repeatedly remarked, patentees, such as the Petitioner here, can take no gain from patents that are used as a part of a conspiracy in violation of the anti-trust laws. Where they are to be barred from recovering in actions for patent infringement under that circumstance, they should not only be required to pay the cost of defending such action for patent infringement but should be penalized therefor in the same manner and for the same purpose as any other damage caused by the violation of the anti-trust laws. The action for patent infringement is but one act of the tort feasors for which damages are coverable. The losses suffered by the respondents as a result of those acts are recoverable as damages and are to be tripled under the terms of the statute. That applies not only with respect to the losses suffered due to stoppage of business, assessed by the District Court and

affirmed by the Court of Appeals, but also the losses suffered by reason of being compelled to defend an illegal action for patent infringement.

It is clear from these circumstances that there is no diversity of opinion with respect to the issue in *Straus* v. *Victor*, as compared with the decision below and *Kobe* v. *Dempsey*, but on the contrary, the same issue was involved in *Kobe* v. *Dempsey* as in the decision below. It was decided the same way on the basis of distinguishing the decision of the Second Circuit in *Straus* v. *Victor*. On the question presented in this case, there is unanimity of opinion between Circuits and no basis whatever for a writ of certiorari.

QUESTION 3

It has been pointed out above that the District Court allowed the amount of attorneys' fees and costs in defending the patent infringement action, stating that the suit was filed as a part of the conspiracy. There is no disputed fact between the District Court and Court of Appeals, but the latter reversed the conclusion of law of the District Court and held that the findings of fact of the District Court sustained the inclusion of the attorneys' fees and expenses in the patent infringement action as compensatory damages.

Without considering whether or not these facts would have justified an award of attorneys' fees under U.S. Code, Title 35, Section 285, it is clear from what has been set out above that the cost of defending the patent infringement suit filed as a part of the conspiracy should be included as compensatory damages. The fact that the District Court committed an error of law does not prevent the Court of Appeals from correcting that error of law; it is its duty to do so and

properly stated the basis for handling the cost of defending the patent suit in the damage claim.

QUESTIONS 4 AND 5

These questions deserve little consideration. They involve no error of law which would justify the issuance of a writ of certiorari.

The Petitioner would have the Court review all of the evidence with respect to the losses suffered by the Respondent, Original, and the claim for damages and the award of attorneys' fees. The Supreme Court should not be burdened with such questions. It is the duty of the trial court to decide issues of fact, to determine the effects of the evidence, and to decide matters of discretion such as the award of attorneys' fees. In the absence of an abuse of discretion, an appellate court should not be asked to, nor should it in fact, review the award. These questions clearly are outside of the scope of review by a writ of certiorari.

CONCLUSION

The questions presented in the Petition are an imposition on the Court.

There is no conflict of opinion between different circuits on the same issue and no allegation of a conflict between the decision below and prior decisions of this Court.

The Petitioner would have the Court review the evidence to determine whether damages were properly awarded, but such is not the function of a writ of certiorari. This Court should reserve the grant of writs to situations where important legal questions are involved.

Under the circumstances, the Petition should be summarily denied.

Respectfully submitted,

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